KMA MARKETING SDN BHD

v.

MBF LEASING SDN BHD

HIGH COURT SABAH & SARAWAK
LINTON ALBERT J
[SUIT NO: 22-39-1999]
17 NOVEMBER 2006

CONTRACT: *Letter of undertaking - Breach - Disbursement of balance of purchase price of vehicles - Admissibility of plaintiff's letter endorsed with defendant's confirmation - Evidence Act 1950, s. 32, 73A - Whether letter of undertaking valid - Whether defendant's defence without merit - Whether defendant discharged from its liability to plaintiff - Whether defendant's contentions unsustainable - Whether plaintiff established its case on a balance of probabilities*

This was a claim by the plaintiff against the defendant under a letter of undertaking given by the defendant to the plaintiff. The letter of undertaking arose from the defendant's offer to one Kiong Huat Transport and Engineering Construction (the buyer) to finance the purchase of three units of Isuzu Dump Trucks (the vehicles) by the buyer from the plaintiff. The defendant's offer to the buyer was in the form of three identical letters of offer from the defendant to the buyer each stating that the defendant agreed to finance the purchase of the vehicles by the buyer from the plaintiff. The letter of undertaking by the defendant to the plaintiff was given at the request of the buyer; it incorporated the three letters of offer and was to facilitate the purchase of the vehicles by the buyer. Pursuant to the letter of undertaking, the plaintiff delivered the vehicles to the buyer. The plaintiff also delivered to the defendant the vehicles' invoices and registration cards with the defendant's ownership claims duly endorsed and the insurance cover note for the vehicles in accordance with the letter of undertaking. By a letter dated 2 January 1998, the plaintiff demanded disbursement of the balance of the purchase price of the vehicles, which the defendant had agreed to finance under the letter of undertaking. After a lapse of almost two and a half months the defendant responded through their solicitors. The defendant's pleaded defence was found in paras. 6, 7 and 8 of the amended defence where the defendant asserted that the letter of undertaking was valid only for 21 days and since the

documents stated therein were not received by the defendant or satisfactorily completed by the buyer within 21 days validity period, the defendant was released from its obligations under the letter of undertaking and the plaintiff could not, therefore, rely on and benefit from it.

Held (judgment entered for the plaintiff):

(1) The argument advanced by the defendant that time was of the essence was demolished by referring to the confirmation by the defendant endorsed on the plaintiff's letter dated 22 August 1997. The admissibility of the plaintiff's letter was challenged by the defendant because the maker was not called and there was lack of specific details and documentary proof of all reasonable efforts to find him. However, this court ruled in favour of its admissibility because the plaintiff had correctly relied on s. 32 of the Evidence Act 1950 read with s. 73A of the same Act. (para 4)

(2) PW1 testified that the maker of the plaintiff's letter dated 22 August 1997 was one David Cheong Wan Meng who was then the branch manager of the plaintiff's branch office at Bintulu but resigned in 1998. The plaintiff had since lost his personal data; checks were also made with Telekom Malaysia directory and the National Registration Department but to no avail and plans to insert a newspaper advertisement were aborted on solicitor's advice. In the light of PW1's credible testimony the reasons relied on by the plaintiff was, on a balance of probabilities, well founded. (para 5)

(3) Set against the clear and unequivocal terms of the plaintiff's letter dated 22 August 1997 endorsed with the defendant's equally unambiguous confirmation thereon, the defendant's pleas under paras. 6, 7 and 8 of the amended defence were decidedly without merit. It was also significant that there was a yawning gap of some seven months between the letter of undertaking and the defendants' solicitors letter containing the cryptic allegation that the plaintiff had not complied with the conditions of the letter of undertaking. That was the measure of the defendant's misplaced reliance on time being of the essence. (para 5)

(4) The defences pleaded by the defendant were of no consequence. The letter dated 1 July 1998 relied on by the defendant did not discharge the defendant from its liability to the plaintiff because it was an expression of the extent to which the plaintiff was prepared to go in order to settle the matter amicably by keeping in abeyance legal action against the defendant for recovery of the balance after accepting a sum of RM38,500 from the buyer to find out the buyer's consistency in making payments. It turned out that that was the last payment the buyer ever made. Hence, this action for the recovery of the balance together with interest therein. (para 7)

(5) The particulars pleaded in support of the defendant's contention that the defendant's confirmation endorsed on the plaintiff's letter dated 22 August 1997 was fraudulent or fraudulently obtained were but mere repetitions infused with pleas asserting that the defendant was unaware of its existence. The person who could and should have shed light on this aspect of the defendant's defence was one Tony Ting Chu Lian who was not called to give evidence and no reason was given for not calling him. Shorn of his evidence there was precious little to support the defendant's contention and was therefore invariably unsustainable. In the circumstances, the plaintiff had established its case on a balance of probabilities. (para 7)

Case(s) referred to:

Rasool v. West Midlands Passenger Transport Executive [1974] 3 All ER 638 ***(refd)***

Royal British Bank v. Turquand [1855] 5 E & B 248 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 32, 73A(6)

For the plaintiff - George Lim; M/s Battenberg & Talma
For the defendant - Stephen Chung; M/s Stephen Robert & Wong

Reported by Suhainah Wahiduddin

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JUDGMENT

Linton Albert J:

[1] This is a claim by the plaintiff against the defendant under a letter of undertaking dated 6 August 1997, given by the defendant to the plaintiff. The letter of undertaking arose from the defendant's offer to one Kiong Huat Transport & Engineering Construction (the buyer) to finance the purchase of three units of Isuzu Dump Trucks (the vehicles) by the buyer from the plaintiff. The defendant's offer to the buyer was in the form of three identical letters of offer all dated 1 July 1997 from the defendant to the buyer each stating that the defendant agreed to finance the purchase of the vehicles by the buyer from the plaintiff. The letter of undertaking by the defendant to the plaintiff was given at the request of the buyer; it incorporated the three letters of offer and was to facilitate the purchase of the vehicles by the buyer. Pursuant to the letter of undertaking, the plaintiff delivered the vehicles to the buyer. The plaintiff also delivered to the defendant the vehicles' invoices and registration cards with the defendant's ownership claims duly endorsed and the insurance cover note for the vehicles in accordance with the letter of undertaking. By a letter dated 2 January 1998 the plaintiff demanded disbursement of the balance of the purchase price of the vehicles, which the defendant had agreed to finance under the letter of undertaking. After a lapse of almost two and a half months the defendant responded through their solicitors' letter dated 13 March 1998 the relevant aspect of which is now reproduced verbatim:

> ... It is our instructions that the letter of undertaking given to your Company by our client was subject to the conditions as stated in the letter. We are instructed that these conditions had not been complied with.

[2] The letter was not particularly useful because it did not specify which of the conditions in the letter of undertaking had not been complied with. The defendant's pleaded defence was, however, more specific and are found in paras 6, 7 and 8 of the amended defence where the defendant asserted that the letter of undertaking was valid only for 21 days and since the documents stated therein were not received by the defendant or satisfactorily completed by the buyer within the 21 days validity period, the defendant was released from its obligations under the letter of

undertaking and the plaintiff could not, therefore rely on and benefit from it. The relevant part of the letter of undertaking is as follows:

> The balance of Purchase price amounting to Ringgit Four Hundred & Fifty Thousand Only ($450,000.00) will be paid to you upon receipt of the following:
>
> 1. Your invoice to us with details of the goods, cash price and deposit paid by the Hirer.
> 2. Satisfactory completion of Hire Purchase documents by the customers.
> 3. Registration Card and Insurance Cover Note with MBF Leasing Sdn. Bhd's ownership claim duly endorsed.
>
> The validity of this undertaking is valid for twenty one (21) days from the date above. Any extension may be given at our discretion only.

[3] I do not think it is necessary to embark on a legal discourse on the doctrine of waiver because the argument advanced by learned counsel for the defendant Mr. Stephen Chung that time was of the essence is demolished by simply referring to the confirmation by the defendant endorsed on the plaintiff's letter dated 22 August 1997. For the sake of completeness the entire contents of this letter is now reproduced:

> We refer to your letter dated 6/8/97 and wish to seek your confirmation to certify that a copy of latest trading licence if applicable and full set of Hire Purchase/Leasing Agreement and Executed Letter of Guarantee, if any have been duly completed, signed and chopped by the Hirer/Lessee and Guarantor.
>
> We will release the vehicle to hirer/lessee upon your confirmation.
>
> Thank you.
>
> Yours faithfully,
> For KMA MARKETING SDN. BHD.
>
> We confirmed that Hire Purchase/Leasing Agreement and Executed Letter of Guarantee have been duly completed, signed & chopped by the Hirer/Lessee and Guarantor and are now in our possession. A copy of latest trading licence is also in our possession.

A We will effect immediate payment to you upon the receipt of the following:

(a) Vehicle Invoice

(b) Vehicle Registration Card properly endorsed

B

(c) Insurance Cover Note

Name of Authorised Officer :

Name of Finance Company :

C

Chopped And Sign :

Date :

[4] The admissibility of the plaintiff's letter dated 22 August D 1997 was for obvious reasons challenged by learned counsel for the defendant because the maker was not called and there was lack of specific details and documentary proof of all reasonable efforts to find him. I ruled in favour of its admissibility because learned counsel for the plaintiff had correctly relied on s. 32 of the E Evidence Act 1950 read with s. 73A of the same Act the relevant provisions of which are these.

Section 32(1)(b):

Statements, written or verbal, of relevant facts made by a person F who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

G (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

H Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

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(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

Section 73A(1):

Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original documents, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[5] PW1, who was since 1992 and still is the plaintiff's accountant testified that the maker was one David Cheong Wan Meng who was then the branch manager of the plaintiff's branch office at Bintulu. David Cheong Wan Meng resigned in 1998 and the branch office at Bintulu was closed down that same year and

the plaintiff had since lost his personal data; checks were also made with Telekom Malaysia directory and the National Registration Department but to no avail and plans to insert a newspaper advertisement were aborted on solicitors' advice. In the light of PW1's credible testimony the reasons relied on by the plaintiff was, on a balance of probabilities well founded (see *Rasool v. West Midlands Passenger Transport Executive* [1974] 3 All ER 638). Set against the clear and unequivocal terms of the plaintiff's letter dated 22 August 1997 endorsed with the defendant's equally unambiguous confirmation thereon, the defendant's pleas under paras 6, 7 and 8 of the amended defence are decidedly without merit. It matters not that the plaintiff now contends that the signatory of the defendant's confirmation on the letter dated 22 August 1977 was not authorized to do so because the plaintiff was not required to inquire as to whether the officer who signed the confirmation, one Tony Ting Chu Lian had such authority (see *Royal British Bank v. Turquand* [1855] 5 E & B 248). Moreover, it is not insignificant that the letters of offer alluded to above were contemporaneous documents signed by Tony Ting Chu Lian on behalf of the defendant. It is also significant that there was a yawning gap of some seven months between the letter of undertaking and the defendants' solicitors' letter containing the cryptic allegation that the plaintiff had not complied with the conditions of the letter of undertaking. That is the measure of the defendant's misplaced reliance on time being of the essence.

[6] Sub-section (6) of s. 73A of the Evidence Act 1950 states:

> In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

[7] In the circumstances of the conclusions I have made the peripteral defences pleaded by the defendant are of no consequence. It is immaterial whether it was the defendant's practice to have the vehicles inspected by its officers before they could be delivered to the buyer because neither the letter of undertaking nor the confirmation endorsed on the plaintiff's letter

dated 22 August 1997 imposed such a requirement. It is beyond me how a purported assignment by the buyer to one Chin Chung United Transport Sdn. Bhd. which fell through can be held against the plaintiff and absolve the defendant from its liability to the plaintiff unsupported as it is by authority. The letter dated 1 July 1998 relied on by the defendant did not discharge the defendant from its liability to the plaintiff because it was an expression of the extent to which the plaintiff was prepared to go in order to settle the matter amicably by keeping in abeyance legal action against the defendant for recovery of the balance after accepting a sum of RM38,500 from the buyer to find out the buyer's consistency in making payments. It turned out that that was the last payment the buyer made. Hence, this action for the recovery of the balance together with interest therein at 1.5% per month pursuant to the customer retail order relating to the delivery of the vehicles under the letter of undertaking. The particulars pleaded in support of the defendant's contention that the defendant's confirmation endorsed on the plaintiff's letter dated 22 August 1997 was fraudulent or fraudulently obtained were but mere repetitions of matters dealt with above infused with pleas asserting that the defendant was unaware of its existence. The person who could and should have shed light on this aspect of the defendant's defence was Tony Ting Chu Lian who was not called to give evidence and no reason was given for not calling him. Shorn of his evidence there was precious little to support the defendant's contention and is therefore, invariably unsustainable.

[8] In the circumstances, I am satisfied that the plaintiff has established its case on a balance of probabilities and accordingly enter judgment for the plaintiff in the sum of RM411,500 with interest thereon at one point five percent per month from 22 August 1997 until date of judgment and thereafter at eight percent per annum until full settlement with costs to be taxed unless agreed. The first third party and the second third party not appearing, I enter judgment against them in terms as prayed for by the defendant in the respective third party notices. Order accordingly.